IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN

TUESDAY, THE 17TH OCTOBER 2006 / 25TH ASWINA 1928

CMA.No. 183 of 1994()

AS.31/1987 of D.C. & SESSIONS COURT,KOZHIKODE
OS.362/1981 of PRL.SUB COURT, KOZHIKODE
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APPELLANTS/RESPONDENTS:
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1. A.G.S. MANDANAGURUSWAMY, AGED 39 YEARS
   S/O. A.G. SREENIVASA NAIDU, BUSINESS MAN
   RESIDING AT TIRUVANGAD AMSOM DESOM
   TELICHERRY TALUK.

2. K. PADMANABHAN NAIR
   S/O. M.KUNHAPPA
   ARYAPURATH, THIRUVANGAD AMSOM DESOM
   TELLICHERRY TALUK.

BY ADV. M/S.T.A.RAMADASAN,K.M.SATHIANATHA MENON

RESPONDENTS/APPELLANTS/SUPP; APPELLANTS 2 TO 5:
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1. V.C.S. BALASUBRAMANIAM, AGED 59
   S/O. V.C. SENAPATHI CHETTIAR
   PANNIANKARA AMSOM, KOZHIKODE (DIED)

2. B. KANTHIMATHI, AGED 52 YEARS
   W/O. LATE V.C.S.BALASUBRAMANIAM
   SANKARA NIVAS, THIRUVANNUR, KOZHIKODE.

3. B. SENAPATHY VISWANATHAN
   S/O. LATE V.C.S.BALASUBRAMANIAM
   SANKARA NIVAS, THIRUVANNUR, KOZHIKODE.

4. B. KALIDAS
   S/O. LATE V.C.S.BALASUBRAMANIAM
   SANKARA NIVAS, THIRUVANNUR, KOZHIKODE.

5. B. CHOCKALINGAM
   S/O. LATE V.C.S.BALASUBRAMANIAM
   SANKARA NIVAS, THIRUVANNUR, KOZHIKODE.

BY ADV. SRI.A.SUDHI VASUDEVAN R1, 2 & 3

THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD ON 17/10/2006
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN, J.

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C.M.A. No. 183 OF 1994
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Dated this the 17th day of October, 2006

JUDGMENT

This appeal arise from an order of remand. The short facts are that a preliminary decree was passed on 16.3.1983 in a suit for dissolution of partnership and rendition of accounts. It was declared that the firm is dissolved. It was also directed that the assets and liabilities of the firm are to be determined and rendition account be decided in the final decree stage.

2. Whatever be the correctness of that decree relegating the determination of assets and liabilities of the firm to the final decree stage, the said preliminary decree has become final. The case has to proceed and end.

3. I.A. No. 1068 of 1984 was filed by the plaintiffs in furtherance to the aforesaid preliminary decree. The trial court

noticed that, among other things, one crucial issue that arose for decision is as to whether the tenancy right over the business premises is an asset of the firm or an individual asset of the defendant. Having regard to the directions in the preliminary decree, the trial court was obliged to decide that issue in the final decree proceedings. By order dated 9.1.1987 that was decided against the defendant holding that the tenancy right over the premises is an asset of the firm.

4. The defendant carried an appeal to the lower appellate court. As per the impugned order, the decision of the trial court on I.A. No. 1068 of 1984 has been set aside and the matter remitted with a direction to pass a preliminary decree. This order of remand is issued by the appellate court holding that the tenancy right over the building is not one on which there could have been an adjudication in the final decree application. The impugned order also proceeds on the basis that the order of I.A. No.1068 of 1984 is not shown to be an interlocutory order

and that a second preliminary decree ought not to have been passed.

5. For one thing, it is settled law that in such a suit, if needed, more than one preliminary decree can be passed, however that there could only be one final decree. That apart, when the preliminary decree was passed relegating the parties to agitate the question as to what are the assets and liabilities of the firm in the final decree proceedings, the courts cannot turn round and tell the litigants that we are powerless in the final decree proceedings to decide the issue relegated as per the terms of preliminary decree, to the final decree stage. Justice has to be done with a meaningful disposal of the litigation.

6. The nature of adjudication done by the trial court on I.A. No. 1068 of 1984 cannot be termed as without jurisdiction. Nor could the order in I.A. 1068 of 84 be treated as void. Under such circumstances, the lower appellate court was obliged to

decide the issue as to whether the findings of the trial court on I.A. No. 1068 of 1984 that the tenancy right over the business premises is an asset of the firm is sustainable. This is what the lower appellate court ought to have done in exercise of power under Section 96 of the Code of Civil Procedure and this is shortly that which has not been done in passing the impugned order. So much so, the impugned order of remand is vitiated on a substantial question of law as to whether the lower appellate court acted in accordance with law, under Order 41 Rule 23 CPC, in making the impugned order of remand. A further appraisal of the facts of the case show that the order of remand was unnecessary and the appellate court ought to have decided the issue regarding tenancy right on its merit.

In the result, the impugned order of remand passed on 4.5.1994 as A.S. No. 31 of 1987 is set aside. The lower appellate court is directed to take back the said appeal to file and hear the parties on the issues arising for decision in the said appeal, on

merits, and dispose of the matter finally within a period of 4 months from the date of receipt of the copy of this judgment. The parties are directed to appear before the lower appellate court on the 14th of November, 2006. Transmit LCR forthwith. The office will ensure that appropriate care is taken to preserve the original of I.A. No. 1068 of 1984 before the returning LCR, rather than it becomes necessary to reconstruct the same later on.

THOTTATHIL B. RADHAKRISHNAN,
JUDGE.

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